

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

ACQUEST WEHRLE, LLC,

Plaintiff,

v.

**TOWN OF AMHERST, DR. SATISH MOHAN,
DEBORAH BRUCH BUCKI, WILLIAM L. KINDEL,
MICHAEL G. MCGUIRE, SHELLY SCHRATZ,
DANIEL J. WARD, MARK A. MANNA,
BARRY A. WEINSTEIN, and
GUY M. MARLETTE,**

Defendants.

**MEMORANDUM
DECISION**

**INDEX NO.
10455-2009**

BEFORE: HON. JOHN A. MICHALEK

**APPEARANCES: RUPP, BAASE, PFALZGRAF,
CUNNINGHAM & COPPOLA LLC
R. Anthony Rupp III, Esq.
David R. Pfalzgraf, Jr., Esq.
Matthew D. Miller, Esq.
Attorneys for Plaintiffs**

**AMHERST TOWN ATTORNEY
E. Thomas Jones, Esq.
Alan P. McCracken, Esq.
Attorneys for Defendants**

MICHALEK, J.:

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Background

Plaintiff alleges that the Town and the Board, acting under color of state law, and pursuant to an official policy, deprived Plaintiff of certain constitutional rights under the United States and New York Constitutions (Complaint ¶12). In addition, plaintiff asserts certain state law causes of action against all of the defendants.

In 1983, the Town accepted a \$5.6 million construction grant from the United States Environmental Protection Agency (USEPA) and the New York State Department of Environmental Conservation (NYSDEC) constituting more than fifty percent of the cost to construct the Southeast Amherst Interceptor and Collector Sewer Project ("Sewer

Project"). The USEPA issued a finding of no significant impact (FNSI) from the Sewer Project on July 12, 1983 (The 1983 Agreement) (Complaint Ex. 2). The 1983 Agreement stated that there were three wetland areas within the affected area, and further that:

...the Town of Amherst has agreed to mitigate potential negative second effects of the sewer project on wetlands by prohibiting for 50 years new development located in the Hopkins Road Wetland and the small wetland North of Wehrle Drive, from connecting to the sewers funded in part by Federal Grant.

(*Id.* at 36). The actual condition imposed by USEPA stated:

The grantee agrees that for a period of 50 years from the date of the FNSI/EA **no sewer hook-up or other connections to the wastewater treatment facilities** included in the facility plan scope of this grant **will be allowed or permitted so as to allow the discharge of wastewater from any building, facility or other construction on any parcel of land within any wetlands**, which land parcel as of the date of the FNSI/EA was undeveloped (i.e. upon which no building, facility or other construction has been erected or placed) unless approved in writing by the Regional Administrator [of USEPA]).

(Complaint Ex. 2 at 37 [emphasis supplied]).

The Town issued a Resolution dated July 5, 1983, which language differs from the condition as stated in the 1983 agreement:

the Town does hereby enact a fifty-year moratorium **on development of properties which are located wholly or partially within state or federal designated wetlands** and which are tributary to sanitary sewers in which there will be NYSDEC or USEPA financial participation under this project...

...
...the Town Board of the Town of Amherst reserves the right to appeal this moratorium with respect to actual wetland boundaries on an individual parcel basis

(Compl. Ex. 1 [hereafter referred to as the Moratorium] [emphasis supplied]).

Of the three areas of wetlands identified by the EPA within the planning area, the only one remaining undeveloped is plaintiff's property at issue here (the Property). The Property contains approximately 25 undeveloped acres: 5.72 acres at 2190 Wehrle Drive and 19.69 acres at 2220 Wehrle Drive (Compl. ¶ 9).

Plaintiff or a related entity purchased the 2220 Parcel in 1997 from GBC in order to pursue a commercial development project.¹ At that time, there was no record of the Moratorium or the Agreement in the Erie County Clerk's office (ECCO) (Compl ¶25). Plaintiff purchased 2220 Wehrle with the understanding that there were only 2.6 acres of wetlands within the parcel (Huntress EBT at 54).

The 2190 parcel was purchased by plaintiff in 2005 – nearly 4 years after the Town requested the tap-in waiver at issue here (Huntress

¹ In 1995, plaintiff's predecessor in interest GBC submitted an application to the Town Board to rezone that property from residential to OB (office business) (Rupp Affid. ¶ 27). This change was ultimately approved by the town board (Complaint Ex. 8). The Town allegedly did not consider the Moratorium in its analysis and conclusion of "negative" impact under SEQRA (see Compl. ¶ 22).

EBT at 42). That property was also rezoned from residential to "office building" (Huntress EBT at 42).

A site plan for development on 2220 Wehrle was submitted to the Town planning board; that site plan was denied based upon the Moratorium (see Plaintiff's Ex. 10, Memo of Town Engineer to G. Black Deputy Planning Director and other Town officials, dated June 2, 2000 ["due to its proximity to federal designated wetlands"]).² In June 2000, Town Board member Daniel J. Ward sought a copy of the Moratorium from town officials (Pl's Ex. 11). The Town attorney forwarded him a copy of the Moratorium and the EPA special grant conditions in late June 2000 (Pl. Ex. 14). A submission regarding the project was made to the NYSDEC, which responded by letter dated August 2000 (Pl Ex. 17). Ward drafted a resolution barring the development (Ex. 18).

In response, plaintiff's owner William L. Huntress sent a letter to the Town Clerk, the supervisor, and the Town Board members dated

² In August 2000, the NYS Department of Environmental Conservation (NYSDEC) reminded the Town that a tap-in waiver was necessary if the Property was to be developed, because, as the planning board report of negative declaration under SEQRA states, the Moratorium required that the Town "prohibit sewer hook up or other connections from any parcel with any federal or state wetlands(Complaint Ex. 8 at 3). Thus, as of 2000, the Town believed that no development on the parcel was permitted to hook up to the sewer if the parcel contained federal or state wetlands - not just if the development affected the wetlands (*id.*)

August 11, 2000, advising that plaintiff had purchased 2220 Wehrle for nearly \$1 million; that it had paid approximately \$100,000 in real estate taxes, including sewer taxes since the purchase; that the Property was not wholly or in part located in a federal or state wetland but "has a insignificant [plus or minus] 2.6 acre wetland"; the Town had previously approved the project including environmental issues; and

...the attached Resolution could jeopardize further Federal Funding because of possible errors related to other projects developed and using the "Youngs Road" interceptor.

Please let this letter serve as the owner's notice to the Town of Amherst of the severe financial situation the Town has imposed on the owner's [sic] through neglect and irresponsibility

(PI Ex. 20).

Plaintiff's counsel wrote to the Supervisor, advising that at the time the property was purchased, there was nothing in the public record which revealed the Moratorium, so much so that the Town itself was apparently unaware of it, by 2000 (PI. Ex. 21). Counsel stated that in 1983, the EPA relied on maps produced by the Interior Department, through aerial photography, and designating the entire 2220 Wehrle Property as wetlands, but a recent wetlands delineation prepared for plaintiff found only 2.61 acres of federal wetlands (id.).

An entity owned by Mr. Huntress submitted a site plan in 2001, which was approved subject to obtaining a tap-in waiver along with other

restrictions (Huntress EBT at 55). In February 2001, the Town Board issued a resolution to request a waiver for a tap-in for 2190 and 2220 Wehrle Drive (the Property) for "Niskayuna Square", a planned office park by plaintiff (Compl ¶¶ 28-29 & Ex. 6). In the request, dated August 2000, the Town indicated that the Interior department maps created from aerial photos tended to be "one of the least reliable ways to identify wetlands" and that, in any event, there had been an apparent substantial change in the character of the parcel" (Ex. 28). The Town admitted that plaintiff had not known of the moratorium when it purchased the parcel, relating that, in fact, its predecessor GBC, Inc had already obtained an ACE permit to fill an acre of wetlands on the Parcel and site plan approval from the Town to develop an office park (Ex. 28 at 8). "It wasn't until a citizen called NYSDEC raising concerns about the rezoning and site plan approval in light of the tap - in restriction, and NYSDEC in turn contacted the Town", that the Town "remembered" the Moratorium (*id.*).

In June 2001, the DEC advised the Town that its study had located two separate wetlands of 9.47 and .0228 acres on the project site that were not NYDEC protected wetlands (Complaint Ex. 8 at 2; see ECL 24-301 [state jurisdiction only over wetlands of 14.5 acres or those of "unusual local importance"]). In addition, by letter dated June 29,

2001, the US Army Corp of Engineers made a jurisdictional determination that the wetlands identified on the Property were "isolated, non-navigable intrastate waters" not subject to regulation under the Clean Water Act, section 404 (Ex. 7). As well be explained later, that determination was reversed in January 2002 (see Huntress EBT at 46).

A negative declaration "Notice of Determination of Non-Significance" was issued by the Town and its Board by report dated December 17, 2001 relative to the rezoning of 2190 Wehrle and the development of the two parcels into an office park with 10 buildings and approximately 1,000 parking spaces (Complaint Ex. 8). A second negative declaration was issued by the Town in May 2002 (Plaintiff's Ex 35).

Despite the absence of federally-regulated wetlands on the property, the Town Planning Board in May and July 2002, approved Acquest's site plan subject to a) a tap-in waiver and 2) a section 404 Permit from the Army Corps of Engineers (ACE) (Compl ¶ 37).

As a result of litigation against the development (the federal Wetlands action) by neighbors³ of the Property in Federal court, on consent of the ACE and plaintiff, Judge Skretny vacated the ACE's jurisdictional determination and remanded the issue for a new

³ These neighbors included Ann Suchnya, who was to play a role in the 2006 withdrawal of the tap-in waiver request.

determination. Due to internal bureaucratic agreements, the EPA took over from the ACE and issued a determination that there were 9.5 acres of federally regulated wetlands on the property (Compl ¶ 39-43 & Ex. 12 [Nov. 2002]; see also Ex. H to Ex 19 [decision of J. Curtain, June 19, 2008, in *Acquest Wehrle LLC v USA & USEPA* at 4]). The USEPA determined that the wetlands were subject to jurisdiction under the CWA "because [they have] a surface hydrological connection through a watercourse originating in the wetland, through ditches and culverts and into Ellicott Creek, to a traditional navigable water" (Complaint Ex. 12 at 1).⁴

After the USEPA re-determination, plaintiff allegedly at "great expense" revised the site plan to mitigate the potential effect on wetlands (Complaint ¶ 44). Then by letter dated December 21, 2004, the EPA notified the Town Board that the Tap-In Waiver request was denied (Ex. 13). The EPA administrator noted that the property owner had "submitted at least one site plan which avoided wetlands impacts completely" which was later withdrawn (*id.*).

As of March 23, 2005, Acquest revised its site plan again and submitted it to the USEPA, now calling for the preservation of 6.6 acres

⁴ CWA jurisdiction was later radically limited by the United State Supreme Court decision in *Ramapos v United States* (547 US 715 [June 15, 2006]).

of onsite wetlands, with the creation of approximately 1.5 acres of wetlands onsite" and some additional wetlands mitigation off site to be determined under the 404 permit process (Complaint Ex. 15).

The Town Planning Board issued a summary of a meeting held with Town engineers, the town attorney, plaintiff's representatives, its counsel, and its engineers on May 20, 2005 which stated:

1. Based on the email from ...EPA to ...Acquest, the Town's request for a sewer tap-in waiver should be characterized as a reconsideration of the original application and not a new application. The Planning Board's action should therefore be sufficient, and Town Board approval should not be required....
2. The order of obtaining approvals should be as follows (EPA has concurred):
 - a. US Army Corps of Engineers grants 404 wetland permit
 - b. Amherst Planning Board approves the site plan
 - c. EPA grants sewer tap-in waiver.

(Compl. Ex. 14 [author: Gary Black])

The Army Corps of Engineers granted the 404 wetland permit, and by letter dated April 7, 2006, Acquest requested that the site plan approval be placed on the Town Planning Board agenda for April 20, 2006 (Ex. 17).

A new Town Supervisor, Satish Mohan, had been elected in 2006 (¶ 56). Plaintiff alleges that Mr. Mohan was friendly with some of the Wetland plaintiffs. Dr. Mohan admitted receiving a letter from Ann Suchyna, but did not remember meeting her at his inauguration dinner, which she attended. Another town resident, active on a number of

issues, had told him he had to meet Ms. Suchyna, who was a neighbor of the Property (Mohan EBT at 55). Beginning in 1989, Dr. Mohan lived in the Royalwoods subdivision, also subject to the Moratorium, and he testified that he was told that a limited tap-in to the USEPA funded sewer from that property had been done sometime in the 1990s (Mohan EBT at 58). The Town asserts that a tap-in waiver was requested from the USEPA with respect to Royalwoods, and was denied (McCracken Affid.) According to Dr. Mohan, his basement flooded all of the time (*id.*) Thereafter he spoke to Dan Ward, asked him what he wanted to do, and he suggested they make a resolution. Mohan visited the Suchnyas at home, however, he testified that he "tapped every door before the election and I had to tap some doors after the election...Lots and lots of people I visited" (Mohan EBT at 64). Flooding was a big issue in his mind (*id.* at 65). Dr. Mohan also met with plaintiff's engineer Ashook Kapoor, and visited the plaintiff's Property (Mohan EBT at 49). Dr. Mohan concluded that it was not an appropriate site for development: there were too many vacant offices in town as it was, and the protection of wetlands was very important (*id.* at 72-74). At that time, he did not know that the USEPA had advised that it would treat the request as a reconsideration, and no new request would be needed from the Town Board (Mohan EBT at 90). He did not know, before they voted on the

March 20, 2006 resolution, that the ACE had issued a provisional permit to plaintiff (*id.* at 91). Dr. Mohan helped draft the withdrawal resolution (*id.* at 102). He did not look at the Planning Board file before the vote (*id.* at 104).

On March 20, 2006, the Town Board held a regular meeting with an extensive agenda (Pl. Ex. 41); the Town alleges that public notice was given of this meeting, but the court was unable to locate any evidence of this in the voluminous record. A number of residents of Bellingham Drive (along with Ms. Suchyna) were present (*id.*) Dr. Mohan was not aware that any personal notice was given to Plaintiff, and he did not tell anyone to do so (Dr. Mohan EBT at 107-108). He was told that the Town Board could always undo what the Planning Board had done, except certain approvals, like subdivision approvals (Mohan at 165, 168).

At that meeting the Board passed a resolution rescinding its Tap-in waiver request and terminating the office park project (Compl ¶57 & Ex. 18). The resolution stated in pertinent part:

WHEREAS Acquest Inc. has previously requested that town of Amherst request a waiver of the moratorium on behalf Acquest, Inc. in order to allow construction of a certain commercial project at premises know as 2190 and 2220 Wehrle Drive, and the Town of Amherst had previously done so; now be it

RESOLVED, upon taking a hard look at the premises and the project, and with due deliberation thereon, including consideration of the wetlands, and a full reconsideration of its actions, the Amherst Town Board now hereby withdraws any

request for waiver of said moratorium, and **terminates said commercial project**

(Compl. Ex. 18 [emphasis supplied]).

By later resolution dated January 16, 2007, the Town Board declared it to be "the policy of the Town of Amherst to honor and enforce the 50 year moratorium..... which includes the property commonly known as 2220 Wehrle Drive and to seek no waiver or variance therefrom," thereby allegedly "reaffirming" defendants' sanction of its prior deprivation of plaintiff's rights concerning the property (Compl. Ex. 3).

Procedural History

Plaintiff filed a CPLR article 78 proceeding on or about June 9, 2006 (Ex. E), and withdrew it thereafter, filing the federal action on September 29, 2006 (Ex. G). That action was dismissed by the court on March 31, 2009 (Ex. I). The instant action was filed on August 28, 2009. The complaint contains nine (9) causes of action:

- 1) Unlawful taking of plaintiff's property rights without just compensation in violation of 42 USC § 1983.
- 2) Breach of special duty
- 3) breach of duty
- 4) promissory estoppel
- 5) prima facie tort

- 6) Procedural due procession violations resulting in liability under 42 USC 1983
- 7) substantive due process (42 USC 1983)
- 8) equal protection
- 9) violation of RPL 290 & 291 by failing to record agreement of moratorium on sewer tap-ins

Procedural issues

Plaintiff seeks to strike the second Black affidavit (July 24, 2012) as a sur-reply containing new arguments and evidence (*Covanta v Amherst*, 70 AD3d 1440, 1443 [4th Dept 2010]). The court will not consider that affidavit.

In addition, the court notes that the Town submitted two "opposing" affidavits, both dated July 25, 2012 and totaling 204 pages, plus exhibits. In addition to making it extremely confusing for the court to wade through 300 plus pages of affidavits by counsel which were really memos of law, the court does not accept sur-replies – as Mr. McCracken is well aware – and cannot consider new evidence submitted for the first time in reply papers, in support of a parties' burden on summary judgment. The court has done its best to exclude from consideration any sur-reply and to give both sides a fair hearing.

Discussion

1. Notice of Claim: the Town

Defendants assert that plaintiff failed to serve a notice of claim in order to preserve its tort claims against the Town (causes of action 2, 3, 5 & 9 [breach of special duty; breach of duty; prima facie tort; RPL §§ 290-291]).⁵

"While in any action founded upon tort no notice of claim need be served upon the [individual] defendant..., a notice of claim must be served upon the municipal corporation (General Municipal Law § 50-e)." (*Cooper v Morin*, 50 AD2d 32, 36 [4th Dept 1975]). Further, "[w]here the relief demanded is primarily equitable in nature and the monetary relief demanded is merely 'incidental to' the equitable relief sought, the notice of claim provisions ... do not apply (*Fontana v Town of Hempstead*, 13 NY2d 1134, 1135" (*Cooper v Morin*, 50 Ad2d at 36).

Thus, "in cases where the applicable notice of claim statute does not expressly include equitable actions, such as, for example, General Municipal Law § 50-e,... the rule has developed that service of a notice of claim is not required where the cause of action is to restrain a continuing wrong by the municipality, and the money damages sought

⁵ No notice of claim was required for the federal constitutional claims (see e.g. *Lopez v Shaughnessy*, 260 AD2d 551 [2nd Dept 1999]).

are merely incidental to the equitable claim" (*Picciano v. Nassau County Civil Service Com'n.*, 290 AD2d 164, 172 [2nd Dept 2001]).

Plaintiff asserts that no notice of claim was necessary for any of the state tort causes of action because 1) the Town had actual notice of the claims against it, unlike in the typical tort case where a municipality may not otherwise know of the incident giving rise to the alleged injury; 2) in any event, plaintiff put the town on notice at least four times, in writing, by letters dated August 11 and 17, 2000, May 10, 2002, and March 23, 2006 (Plaintiff's Exs. 20 & 21 & 34; D's Appendix Ex. Q). Plaintiff asserts, finally, that given that the Town litigated this action for three years before raising this issue, it should be deemed to have waived the issue or should be estopped from raising it (*see generally Renwick v Allegany*, 34 Misc 2d 461, 463-464 [Sup Ct Cattaraugus County 1962], *rev'd on other grounds* 18 AD2d 877 [4th Dept 1963]; *Robinson v New York*, 24 Ad2d 260, 267 [1st Dept 1965]); or, in the alternative, plaintiff should be permitted to serve an amended complaint comporting with the proof (*see Sweeney v New York*, 225 NY 271, 273-275 [1919]).

In reply, the Town asserts that 1) letters written six years prior to the alleged accrual of the state torts cannot serve as a notice of claim; and 2) the 2006 letter failed to give notice of any state torts or sufficient details (*see Gass v Hahn*, 98 AD2d 741 [2nd Dept 1983]); and 3) the

failure to file a notice of claim and so state in a resultant pleading is a jurisdictional defect, if the one year and ninety days has passed (*Mroz v City of Tonawanda*, 999 F Supp 436, 452 [WDNY 1998]). The Town notes GML § 50-e [6], which provides:

Mistake, omission, irregularity or defect. At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

(GML § 50-e [6]). However, the courts have held that defects that can be overlooked do not include substantive changes, like adding new causes of action or significantly changing the theory of liability (see *Harrington v City of New York*, 6 AD3d 662, 663 [2nd Dept 2004]; *Abrahamson v Gates at Melville LLC*, 278 AD2d 186, 187 [2d Dept 2000]).

Further, the Town asserts that there is no basis for waiver or estoppel, where 1) the Town raised the absence of a notice of claim in defense to the article 78 proceeding plaintiff brought in 2006, and many times thereafter; 2) and the town did not in any way induce plaintiff not to serve a notice of claim (see *Wilson v City of Buffalo*, 298 AD2d 994 [4th Dept 2002], *lv denied* 99 NY2d 505 [2003]; *Hall v NFTA*, 206 AD2d

853 [4th Dept 1994]). The court agrees.

The court finds that plaintiff's August 11, 2000 letter sent to the Town Clerk, the supervisor and certain Town board members constituted sufficient compliance with the notice of claim requirements, under the circumstances. However, with the exception of the RPL claims, the remaining state tort and constitutional claims accrued AFTER that letter, and therefore that letter could not serve as notice of those claims.

Further, plaintiff's March 23, 2006 letter to the town supervisor, the town board members and (apparently) the town clerk does not comply because it raises only the issue of a "takings" claim, not any of the state tort or other state constitutional causes of action.

Contrary to plaintiff's contention, the proceeding pursuant to CPLR article 78 brought and then voluntarily withdrawn in 2006 cannot serve as a notice of claim where it appears to indicate the opposite, i.e. a notice that plaintiff would not sue under state law, only federal constitutional law.

As to the Real Property Law claims, those are not torts and in any event, as the Town argues, plaintiff cannot seek money damages as a result of a violation of those statutes,⁶ only equitable relief – the voiding of the Moratorium as to plaintiff. Therefore, no notice of claim was

⁶ Plaintiff does not appear to contest the lack of a damages remedy for this cause of action.

necessary as to that cause of action.

Therefore, the court dismisses the prima facie tort and breach of duty causes of action (2, 3 and 5) as against the Town based upon failure to timely serve a notice of claim with respect to those state tort actions.⁷

As noted earlier, no such notice is necessary with respect to a section 1983 claim or the RPL claims if no damages are sought, or in any cause of action whether the predominant claim is for injunctive relief, rather than for monetary damages.

2. Notice of Claim: Individual Defendants

No notice of claim is necessary for claims against town officers in their individual capacities (*see Copece Contr Corp. v County of Erie*, 115 AD2d 320 [4th Dept 1985]; *see also Kaplin v Cunningham*, 60 AD2d 997 [4th Dept 1978]). General Municipal Law § 50-e(3) requires that an individual town employee be named in a notice of claim only where such a notice is required by law – and it is not required where, based upon the allegations, the Town is not required to indemnify the employee (*see Rew v County of Niagara*, 673 AD3d 1463, 1464 [4th Dept 2010]).

A county's duty to indemnify an employee "turns on whether [the employee was] acting within the scope of [his or her] employment (see Public Officers Law § 18 [1] [a], [b]; [4

The Town argues that the state constitutional claims are barred for the same reason. The court disagrees (*Margerum v City of Buffalo*, 63 AD2d 1574, 1580 [4th Dept 2009]).

[a])," and whether the obligation to indemnify the employee was formally adopted by a local governing body (*Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 818 [2006]; see Public Officers Law § 18 [2] [a]).

(*Rew v. County of Niagara*, 73 AD3d at 1464). Under the Town Code section 14.4, the town is obligated to indemnify and hold harmless the Town Board members "from losses arising from actions which may be brought against them in their individual capacity as a result of their acting within the scope of their public employment or duties" (*McCracken Affid.* ¶ 54).

Under state law, the duty to indemnify does not arise where "the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee" (Public Officers' Law § 4 [b]). Thus, no notice of claim was necessary be served as against the individual defendants to the extent that the allegations against them involved intentional or reckless behavior and their behavior was outside of the scope of their employment.

As will be determined herein, there are questions of fact concerning the character of the individual defendants' actions.

The Town also alleges that voting to withdraw the Tap-In Waiver was within the scope of the individual board members employment. The issue is not simply the withdrawal of the tap-in waiver but also the termination of the plaintiff's commercial project. This issue is more

relevant with respect to the issue of immunity. *See infra*, section 9.

3. Statute of Limitations: the Town

3A. In General

Defendants allege that all of the causes of action against the Town are barred by the statute of limitations, whether under the GML (one year and ninety days) or under the CPLR. The parties make several arguments about when the causes of action accrued.

The court rejects the contention that any causes of action accrued in 1983 when the Town agreed to the fifty-year moratorium. *See infra*.

The next potential accrual date is March 23, 2006, when the Town passed the resolution withdrawing the tap-in waiver request and terminating the Project. An additional potential date is January 2007, when the Town passed a resolution barring any more tap-in waiver requests.

Plaintiff relies upon CPLR 205(a), which provides:

New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Here, plaintiff brought a lawsuit in federal court in 2006, which was dismissed as to the Town by Judge Curtin's decision of March 31, 2009 (Ex. I). That lawsuit alleged that plaintiff's property was not subject to the CWA (42 USC § 1344 et seq.) and sought damages from the Town for an unconstitutional taking of property without just compensation (Ex. I at 1-2). The instant action was commenced within six months of the dismissal of that action, on August 28, 2009.

Plaintiff asserts that dismissal based on lack of ripeness is a proper basis for application of CPLR 205 (see *Matter of New York Blue Line Council Inc. v Adirondack Park Agency*, 85 Ad3d 756, 760 n.4 [3rd Dept 2011], lv denied 18 Ny3d 806 [2012] [ripeness relates to subject matter jurisdiction]). The court agrees. There are two main issues, however, concerning whether the causes of action here relate back to the time of commencement of the federal action: 1) the addition of eight causes of action; and 2) the addition of the individual defendants.

As to the addition of the other causes of action, plaintiff argues that CPLR 205(a) does not require an identity of causes of action in the new complaint. Rather, it requires only that the new action be based on the same transaction(s) or occurrence(s) as the prior one (see *Genova v Madani*, 283 AD2d 860,861 [3rd Dept 2001], citing *Harris v United States Liability Ins. Co.*, 746 F2d 152, 153-154 [2nd Cir 1984]). Therefore, the

court determines that none of the causes of action as against the Town are barred by the statute of limitations, if they would have been timely if asserted at the time of the filing of the federal action on September 29, 2006.

The court will address that issue with respect to each of the remaining causes of action, and then address the additional defendants.

3B. Statute of Limitations: Takings Claim

The first cause of action asserts that:

by entering into the Agreement, enacting the Moratorium, failing to place on file with the [ECCO] the Agreement and the Moratorium which purports to prohibit all development of the ... Property, issuing the March 20, 2006 Resolution rescinding the 2001 Tap-In waiver request, "terminating" the... Project... and again declaring by Resolution in January 2007 that it would not seek a Tap-In Waiver...., the Town has unlawfully taken the ... property without just compensation in violation of 42 USC section 1883, the Constitutions and Laws of the State of New York and the United States of America

(D's Ex. A at 12-13).

In New York, the statute of limitations on a "de facto" takings claim is three years under CPLR 214(4), for an action to recover damages for an injury to property (see *Sarnelli v City of New York*, 256 Ad2d 399 [2nd Dept 1998]). The Town alleges that this cause of action accrued in 1983, and therefore was time-barred at the commencement of the federal

action in 2006.

Plaintiff has established a prima facie case, and the Town has failed to raise an issue of fact, that the Moratorium itself did not constitute a de facto taking of plaintiff's property rights, because under the July 5, 1983 resolution the Town reserved "the right to appeal this moratorium with respect to actual wetland boundaries on an individual parcel basis" (Complaint Ex.1). Rather, that cause of action accrued at the earliest when the Town withdrew its tap-in waiver request and "terminated said commercial project" on March 23, 2006 (see generally *Linzenberg v Town of Ramapo*, 1 AD3d 321 [2nd Dept 2003] [property owners inverse condemnation claim accrued when Zoning Board reached final decision regarding his application for area variances]).

The third cause of action in the federal complaint alleges that "[b]y entering into the Moratorium Agreement and refusing to permit Plaintiff to proceed with a lawful use of the ...Property and permit it to realize a reasonable return thereon", the Town of Amherst took the property without just compensation in violation of the federal and New York state constitutions (D's Ex. G at 10). The cause of action also incorporates paragraph 47 alleging the rescission of the Tap-In Waiver request and termination of the Project (*id.* at 8).

Thus, this cause of action was timely under CPLR 205 (federal

action filed in 2006, state action filed within 6 months of dismissal of federal action).⁸

3C. Statute of Limitations: 1983 actions

"[I]n a suit seeking declaratory and injunctive relief which is based .[upon].. 42 U.S.C. 1983, the applicable limitation in a case arising in New York is the three year limitation now provided for suits 'to recover upon a liability * * * created or imposed by statute' by what is now CPLR 214, subdivision 2" (*Romer v. Leary*, 425 F2d 186, 187 [2nd Cir 1970]).

Because, as stated above, the federal action was timely brought, and the section 1983 constitutional claims arise out of the same "same transaction or occurrence" and were included in the timely 2009 complaint, they were timely brought against both the Town and the individual defendants, who are "united in interest" with the Town (*see supra*).

3D. Statute of Limitations: RPL Cause of Action

Real Property Law (RPL) § 291 provides that:

[a] conveyance of real property, within the state ... may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees

⁸ Individual town employees cannot be held liable for takings without compensation, as they have no individual condemnation powers (cf. McCracken Affid. ¶ 91).

therefor, record the same in his said office. **Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof...** in good faith and for a valuable consideration... and whose conveyance, contract or assignment is first duly recorded.

The ninth cause of action asserts that the Town failed to record the Agreement and Moratorium in the Erie County Clerk's office, "impeding, encumbering and negatively affecting plaintiff's use of the property" (Complaint ¶ 103) and seeks a declaration that the moratorium is void as against plaintiff's property.

"Although declaratory judgment actions are typically governed by a six-year statute of limitations (see CPLR 213 [1]), if the underlying dispute could have been resolved through an action or proceeding for which a specific, shorter limitations period governs, then such shorter period must be applied" (*Trager v Town of Clifton Park*, 303 ad2d 875 [3rd Dept 2003] [cits. om.]). The Town asserts that the action could have been brought as a CPLR article 78 petition challenging the 2002 site plan approval including the requirement of a Tap-In Waiver, and therefore the statute of limitations was four (4) months (CPLR 217).

However, plaintiff asserts that it is challenging, not the site plan approval, but the failure to record the Moratorium, a legislative enactment by the Town; and the validity of legislative enactments cannot

be challenged through article 78 proceedings (see *Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 388 [2006]).

In the court's view, however, a failure to record a necessary document under RPL 290 is an administrative act, not a legislative act. Further, it could be stated that the act of agreeing to the contract with the USEPA was an administrative and not a legislative act, as no statute was promulgated (see e.g. *Press v County of Monroe*, 50 NY2d 695, 703 [1980] ["[t]he action of the Monroe County Legislature sought to be reviewed was not 'legislative' in the precise sense of that term; even in a technical sense the action in each year was taken by adoption of a resolution, not enactment of a local law"; four month statute of limitations applied]).

The accrual date of this claim would be no later than 2000: Mr. Huntress admits that he found out about the Moratorium through a letter from the Town Engineering Department in June 2000. Thus, the Court dismisses the RPL 290-291 (ninth) cause of action as time-barred.

4. Statute of Limitations: Individual Defendants

The individual defendants assert that all of the claims against them are barred by the General Municipal Law §50-1 (c) statute of limitations, requiring suit within one year and ninety days after accrual, and that CPLR 205 (a) is inapplicable because they were not parties to the federal

action.

Again, the accrual dates for the complaint were either March 23, 2006 or (according to plaintiff) January 2007. The instant complaint was not filed until August 28, 2009, more than one year and 90 days after both of those dates. Therefore, unless CPLR 205(a) applies here, none of the causes of action can proceed against the individual defendants.

Plaintiff asserts that the individual defendants are united in interest with the Town, and therefore CPLR 205 does apply. "The relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest' (CPLR 203 [b])" (*Buran v. Coupal*, 87 NY2d 173, 177 [1995]).

With respect to application of the "relation back" doctrine,

In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of [the] same conduct, transaction, or occurrence, (2) the new defendant is **united in interest** with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he will not be prejudiced in maintaining his defense on the merits, and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*Boodoo v. Albee Dental Care*, 67 A.D.3d at 718, 888 N.Y.S.2d 209; see *Buran v. Coupal*, 87 N.Y.2d 173, 178, 638 N.Y.S.2d 405, 661 N.E.2d 978). "The linchpin of the

relation-back doctrine is whether the new defendant had notice within the applicable limitations period" (*Alvarado v. Beth Israel Med. Ctr.*, 60 A.D.3d 981, 982, 876 N.Y.S.2d 147 [internal quotation marks omitted]; see *Buran v. Coupal*, 87 N.Y.2d at 180, 638 N.Y.S.2d 405, 661 N.E.2d 978).

(*Lopez v. Wyckoff Heights Medical Center*, 78 A.D.3d 664, 665 [2nd Dept 2010], quoting *Boodoo v Albee Dental Care*, 67 AD3d 717, 718 [2nd Dept 2009]).

A party is deemed to be united in interest with another party generally "where one of the parties is vicariously liable for the conduct of the other" (*Mondello v New York Blood Ctr.*, 80 NY2d 219, 225 [1992], *mod on other grounds by Buran v Coupal, supra*). Here, the original defendant, the Town, can be held vicariously liable for actions of the members of the Town Board within the scope of their employment (see *Brown v State*, 89 NY2d 172, 194 [1996]; *Berean v Lloyd*, 3 Ad2d 585, 590 [3rd Dept 1957] [town may be held vicariously liable for acts of the town board and town officers]). The Town admits that it may be found vicariously liable for acts of town board members in their official and individual capacities (see McCracken Affid. ¶61 citing *Urraro v Green*, 106 Ad2d 567 [2nd Dept 1984]). Finally, the 2006 federal litigation included claims against federal agencies and a single takings cause of action against the Town (see Defendants' Ex. I), which claim could not have been asserted against the individual town board members (*Sarnelli v City*

of New York, 256 AD2d 399, 400 [2nd Dept 1998], *lv denied* 93 NY2d 804, 958 [1999], quoting *Matter of Ward v Bennett*, 214 Ad2d 741, 743 [2nd Dept 1995]).

The Town mis-cites the law by alleging that the Town board members are not united in interest because there was no "excusable" mistake in failing to join them in the federal action; after *Buran v Coupal*, which modified *Mondello*, there need only have been a "mistake", not an excusable mistake (see *Buran*, 87 NY2d at 176). The fact that the Town may not be subject to punitive damages and lacks the capacity to assert a qualified privilege does not alter the fact that the Town acts only through its officers, in this case the Town board members. (That issue is reserved until trial).

However, the three members of the board who took office in 2008 must be dismissed from the action entirely, therefore their status is irrelevant. They had nothing to do with the 2006 and 2007 resolutions, and therefore, with any of the constitutional violations at issue.

5. Takings Claim: Defendants' Motion for Summary Judgment

The Town moves for summary judgment on the takings claim (first cause of action) alleging that there is no "direct legal restraint on plaintiff's use of its property", and that the Town's actions advanced legitimate Town interests and did not deny plaintiff all economically

viable usage of its land. Further, the Town seeks dismissal of the demand for damages under *Charles v Diamond* (41 NY2d 318 [1977]), alleging that plaintiff is at most entitled to have the withdrawal of the Tap-In Waiver request annulled.

In response, plaintiff asserts that the Town misstates the applicable law, and that there are issues of fact that bar summary judgment concerning whether any economically viable use remains. The court agrees.

The first cause of action alleges:

By entering into the Agreement, enacting the Moratorium, failing to place on file with the [ECCO] the Agreement and the Moratorium which purports to prohibit all development of the Wehrle Drive Property issuing the March 20, 2006 Resolution rescinding the 2001 Tap-In Waiver request, "terminating the Office Park project...and again declaring by Resolution in January 2007 that it would not seek a Tap-In Waiver for the Wehrle Drive Property, the Town has unlawfully taken the Wehrle Drive Property without just compensation in violation of 42 USC Section 1983, the Constitution and laws of the State of new York and the United States...

(Compl. ¶ 63).

Even if the Moratorium does contain ambiguous language, no party has submitted extrinsic evidence from the drafters of the Moratorium, and the court must therefore interpret the document as a matter of law (see generally *Village of Hamburg v American Ref-Fuel Co. Of Niagara*, L.P. 284 AD2d 85, 88 [4th Dept 2001]). The court determines as a matter

of law that the Moratorium itself effected no taking under the fifth amendment to the United States Constitution, because the Town reserved the right to seek a Tap-in Waiver, and the USEPA recognized that right in the Town; further the Town successfully obtained a tap-in waiver for the 2250 Wehrle Property. The question remains whether the promulgation of the 2006 and 2007 Resolutions constituting a taking.

5A. Jurisdictional Wetlands

Despite plaintiff's assertion of a "takings" claim, the complaint alleges that there are no New York state designated wetlands on the Property; and, without the presence of federal or state wetlands, the Agreement and Moratorium do not apply and no tap-in waiver is necessary (Compl. ¶¶31-32). The Town puts forth the same argument: that this action will be moot if the United States District Court for the Western District of New York, in an action brought by the USEPA against Mr. Huntress in 2009 and a subsequent action brought by Acquest in June 2012 (Ex. 33) ultimately determines that the Property does not contain federal jurisdictional wetlands.

Specifically, the Town asserts that there is no difference between "designated" and "jurisdictional" wetlands - therefore, no tap-in waiver would be necessary to develop on the "designated" wetlands on plaintiff's property if they are not jurisdictional (see Moratorium ["on development

of properties which are located wholly or partially within state or federal designated wetlands”]).⁹ The Town contends that no determination can be made on this cause of action until those cases are resolved. Given the Town’s continuing stance against development of this property and this Court’s interpretation of the Moratorium (*see supra*), the court determines that the case is ripe for decision now, regardless of the outcome of the pending federal action.

5B. Taking Through Regulation

Contrary to the Town’s motion papers, a taking may be effected through regulations that deny a land owner any economically viable use of its land (*Tahoe-Sierra Preserv. Coun v Tahoe Reg. Planning Agcy*, 535 US 302 [2002]; *Lucas v South Carolina Coastal Coun.*, 505 US 1003, 1016 [1992]). Such a taking may be categorical or per se, requiring that the regulating body pay compensation regardless of the basis for the regulation— such as when “the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle” (*Lucas*, 505 US at 1019 [emphasis in original]).

The Appellate Division, Second Department in the case of *Matter of Friedenborg v NYSDEC* (3 AD3d 86 [2nd Dept 2003] [Miller, J.]) analyzed

⁹ This argument contradicts the Town’s actions prior to the EPA assertion of jurisdiction in 2002.

the *Lucas* decision as modified by the later United States Supreme Court case of *Tahoe-Sierra Preserv. Coun. v Tahoe Reg. Planning Agcy* (535 US 302 [2002]):

In *Tahoe-Sierra*, the Court used the opportunity to clarify the holding in *Lucas* and narrow the exception in which a categorical or per se rule applies to a regulatory taking. "The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of 'all economically beneficial uses' of his land" (*Tahoe-Sierra Preserv. Coun. v. Tahoe Regional Planning Agcy.*, supra at 330,... quoting *Lucas v. South Carolina Coastal Council*, supra at 1019). The Court reiterated that the "statute [in *Lucas*] that wholly eliminated the value [of the property interest] clearly qualified as a taking," but the holding in *Lucas* was "limited to 'the extraordinary circumstances when no productive or economically beneficial use of land is permitted' "(*Tahoe-Sierra Preserv. Coun.* supra at 330, 122 S.Ct. 1465 [emphasis in original], quoting *Lucas*, supra at 1017). To emphasize the word "no" relative to productive use, the Court pointed to a footnote in *Lucas* which explained that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value" or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central* (*Tahoe-Sierra Preserv. Coun.*, supra at 330, quoting *Lucas*, supra, at 1019).

(*Matter of Friedenborg*, 3 AD3d at 94-95).

Thus, where no per se taking is proven, the property owner must prove a taking using the balancing test developed in *Penn Central Transportation v City of New York*, (438 US 104 [1978]), i.e. "ad hoc factual inquiries" (*Friedenborg*, 3 AD3d at 95).

Where a per se taking is not demonstrated, whether a taking has occurred may be determined by an examination of various factors such as those set forth in the *Penn Central* case: the economic impact of the regulation, the extent to

which the regulation has interfered with reasonable investment-backed expectations, and the character of the governmental action

(*Matter of Gazza v. New York State Dept. of Env'tl. Conservation.*, 89 NY2d 603, 617, *cert denied* 522 US 813 [1997]).

5C. Deprivation of an Inherent Property Interest

A takings claim may not be based upon property rights "that have already been taken away from a landowner in favor of the public" (*Matter of Gazza v NYSDEC*, 89 NY2d 603, 613, *cert denied* 522 US 813 [1997]). Here plaintiff asserts that it was unaware of the Moratorium when it purchased 2220 Wehrle Drive for nearly \$1 million. The Town contests this assertion. submitting two documents along with a reply affidavit from Gary Black, documents that the court cannot consider in support of the Town's burden on summary judgment (see supra). However, as noted earlier, in the 2000-2001 tap-in waiver request, the Town essentially admitted that Mr Huntress or an entity owned by him had purchased the property without knowledge of the moratorium – which the Town itself had forgotten. The court determines that plaintiff has established this fact as a matter of law, and the Town has failed to raise an issue of fact for trial.

5D. Per Se Taking or Not

Plaintiff contends that this court should find a per se taking

because the Town's action in passing the 2006 and 2007 Resolutions, revoking the tap-in waiver request, terminating plaintiff's commercial Project and making it Town policy never to request a waiver, prevent Acquest from doing anything to develop its property. In addition, the Town has never rescinded the portion of the resolution "terminating" the Project despite its admission that the Board lacked authority to do so.

The court determines that questions of fact remain for trial on this issue.

The Town vigorously argues that plaintiff's property can still be developed, if it provides a private sewer service or taps into a different non-USEPA funded sewer located 1,000 feet from the property (McCracken Affid. ¶ 248; Ketchum Affid. at 17-12). This is contrary to positions the Town has taken several times during the events at issue here. In August 2000, the Town had been reminded by NYSDEC that the tap-in waiver was necessary, because, as the planning board report of negative declaration under SEQRA states, the Moratorium required that the Town:

prohibit sewer hook up or other connections from any parcel with any federal or state wetlands

(Complaint Ex. 8 at 3). Thus, as of 2000, the Town believed that no development on the parcel was permitted to hook up to the sewer if it contained federal or state wetlands (*id.*) The issue was not whether

plaintiff's proposed development was in a wetland: rather, if there were designated wetlands on a parcel (as there were in 1983, covering nearly the entirety of 2220 Wehrle), no development could take place on a parcel.

Further, by way of affidavit submitted in support of the Town's motion, Mr. Ketchum opines that no development is permitted under the Moratorium on parcels containing the wetlands, absent a tap-in waiver request from the town. This is a consistent position by the Town Planning Board – the entity that would ultimately have to approve the site plan.

The Court agrees, however, with plaintiff's assertion that differentiates between "designated wetlands" and whether the USEPA and/or the DEC has "jurisdiction" to regulate the use of those wetland areas.

The use of the word "designated" in the Moratorium document does not comport with its use in State law. NYSDEC is "responsible for regulating the use of *designated* wetlands, and ECL 24-0701 prohibits landowners from engaging in certain activities on the designated properties unless a permit is obtained from DEC" (*Matter of Wedinger v Goldberger*, 71 NY2d 428, 436 [1988] [emphasis supplied]). That case dealt with landowners who acquired property on Staten Island before the

NYSDEC had designated those properties on a tentative or final map as containing wetlands (*id.* at 437). NYSDEC discovered that those petitioners were beginning to develop their properties, and thereafter "formally notified [them]... that their lands were tentatively identified as freshwater wetlands, and that if they wanted to continue development they had to apply first for a permit from DEC" (*id.*, citing ECL 24-0703(5) and 6 NYCRR part 662). The Court of Appeals held that the NYS DEC had jurisdiction over the wetlands, and could regulate them, even if they had not yet been designated as such (*id.*)

ECL 24-0703(5) provides: "Prior to the promulgation of the final freshwater wetlands map in a particular area and the implementation of a freshwater wetlands protection law or ordinance, no person shall conduct or cause to be conducted, any activity for which a permit is required under section 24-0701 of this article on any freshwater wetland unless he has obtained a permit from the commissioner under this section. Any person may inquire of the department as to whether or not a given parcel of land will be designated a freshwater wetland subject to regulation. The department shall give a definite answer in writing within thirty days of such request as to whether such parcel will or will not be so designated" (emphasis added).

This provision would be rendered meaningless if DEC lacked jurisdiction to regulate wetlands during the entire evolving period up to and including final mapping. The effective date of the legislation (L.1975, ch. 614, eff. Sept. 1, 1975) and the promulgation of a final map is the critical span of jurisdictional life we must examine for purposes of deciding these cases. The mere fact that a particular property was not placed on a tentative map is not decisive and certainly does not deprive the DEC of legislatively delegated jurisdiction. The length of time it has taken DEC to fulfill its mandate, however unfortunate, does

not determine or diminish the jurisdiction delegated to it by the Legislature.

(*Matter of Wedinger*, 71 NY2d at 438). The court also noted that "tentative designation as a wetland does not prohibit development nor does it convert the ownership from private to public in any property sense; it merely requires that those holding property interests and wishing to engage in certain activities obtain an administrative permit" (*id.* at 439). Thus, under the law, wetlands are designated by the State and if so, are jurisdictional as to the State; as to USEPA, state-designated freshwater wetlands may be non-jurisdictional under the CWA (see e.g. *Altman v Town of Amherst*, 47 Fed Appx 62, 67 [2nd Cir 2002]).

The 1983 moratorium at issue here was imposed during the mapping process by NYSDEC in the 1980s. The wetlands here were mapped by air as of 1983 and therefore, designated, even if non-jurisdictional by either government.

5E. Value of the Taking

There are obvious questions of fact concerning the value of any property interest was taken.

Finally, the court declines to dismiss plaintiff's demand for money damages under this cause of action (see e.g. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 [1987] [temporary regulatory taking may requires compensation for certain

period of time during which the taking was effective]; see *Matter of Wedinger*, 71 NY2d at 440).

6. Substantive Due Process

Plaintiff argues that it has established as a matter of law that it possessed a property interest, sufficient for substantive and procedural due process, in the Town's 2002 Tap-In Waiver Request, and that the Town has failed to establish any issues of fact for trial to deprive it of the relief it seeks on these causes of action (Memo of law at 19). In opposition, the Town asserts that plaintiff lacks a protectable property interest under the fourteenth amendment (McCracken Affid. ¶ 328-333), because plaintiff did not commence any building construction on the property; and because the Town had discretion to deny the relief plaintiff sought.

There is a two-part test for determining whether a town has violated a property owner's substantive due process rights in the land-use context: whether the town has deprived the owner of a vested property interest and whether the challenged governmental action was wholly without legal justification (*Glacial Aggregates LLC v Town of Yorkshire*, 14 NY3d 127, 136 [2010], citing *Town of Orangetown v Magee*, 88 NY2d 41[1996]; see also *Bower Assoc. v Town of Pleasant Valley*, 2 NY3d 617 [2004]).

"42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations" (*Bower Assoc. v Town of Pleasant Val.*, 304 AD2d 259, 263 [2d Dept 2003]). "[D]enial of a permit--even an arbitrary denial redressable by an article 78 ... proceeding--is not tantamount to a constitutional violation under 42 USC § 1983; significantly more is required" (*Bower Associates v. Town of Pleasant Valley*, 2 NY3d 617, 627 [2004]).

6A. Property Interest

Under US Supreme Court precedent:

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests-property interests-may take many forms.

.....

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. ... Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

(*Board of Regents of State Colleges v. Roth*, 408 US 564, 577 [1972]).

In the *Town of Orangetown* case relied upon by both parties, "[k]ey to establishing the cognizable property interest was that the right to develop the[] land had vested under State law: [the plaintiffs] owned the

land, a permit and improvements and "unquestionably would have received the limited future authorizations necessary to complete the project. . . . [T]he Town had 'engendered a clear expectation of continued enjoyment' of the permit sufficient to constitute a protectable property interest for purposes of a section 1983 claim" (Town of Orangetown v Magee, 88 NY2d at 52-53, quoting Barry v Barchi, 443 US 55, 64 n 11 [1979])." (*Bower Associates v. Town of Pleasant Valley*, 2 NY3d 617, 627-628 [2004]). This test must be "applied with considerable rigor" (*RRI Realty Corp v Inc. Vil. Of Southampton*, 870 F2d 911, 918 [2nd Cir 1989]).

Application of the test must focus primarily on the degree of discretion enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case....Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest. The "strong likelihood" [test] comes into play only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured; an entitlement does not arise simply because it is likely that broad discretion will be favorably exercised. Since the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise, the question of whether an applicant has a property interest will normally be a matter of law for the court.

(*RRI Realty Corp.*, 870 F2d at 918).

Plaintiff submits extensive evidence in the form of affidavits and documentary evidence relied upon by both sides, to support its burden

on summary judgment. It asserts that, similar to the landowner in *Glacial Aggregates*, it obtained the Town's approval by its submission of the tap-in waiver request, on February 12, 2001 (actually submitted by the Town in January 2002), subject only to approval and cross-permitting from the EPA and the ACE (see Mem of law at 22, citing Complaint Ex. 6; Plaintiff's ex. 28), and final approval of a site plan by the Planning Board. This Request was submitted after the Town admitted that it had made errors in a) permitting development in the other properties with affected wetlands without first requiring a tap-in waiver; and 2) allegedly looking the other way when the Royalwoods subdivision secretly tapped in to the sewer in violation of the Moratorium (see Mohan EBT at 58; Suchnya Letter at Ex. 38).

Thereafter until March 2006, Acquest relied upon the Town's request by investing considerable sums to prepare site plans, avoid use of wetlands, mitigate wetlands, and satisfy the federal agencies (*id.*).

The record is clear that the Town Board had no further discretion to exercise as to the Project after the EPA, by letter dated June 28, 2005 notified then-Supervisor Grelick that after review of plaintiff's revised site plan, it had notified plaintiff and the ACE that this would "form the basis of an acceptable waiver request (pending the completion of appropriate additional off-site mitigation as determined through the [Clean Water Act

] section 404 [permit] process ...)" (Complaint Ex. 15). The EPA admitted that it never had dictated to the town what process was necessary to request a waiver, except that it must come from the Town. The EPA therefore further requested that the Town notify plaintiff "directly of the procedures that will be followed by the Town and of the steps that will be needed to request a waiver for this project, once all 404 permitting issues and site plan approvals have been obtained" (*id.*)

In fact, previously, on May 20, 2005, the Town Engineer, Mr. Black the then Assistant Planning Director, attorneys and representatives of plaintiff had met regarding the site plan for the Project. Mr. Black wrote that the EPA had determined that the Town's request for a sewer tap-in waiver "should be characterized as a reconsideration of the original application and not a new application" (Ex. 14). Further,

the Planning Board's action should therefore be sufficient, and Town Board approval should not be required.... The order of obtaining approvals should be as follows (EPA has concurred):

- a. US Army Corps of Engineers grants 404 wetland permit
- b. Amherst Planning Board approves the site plan
- c. EPA grants sewer tap-in waiver.

(*Id.*) Mr. Black now avers that the Town Planning Board has no jurisdiction to deny approval of a site plan simply because it may disapprove of the development; rather its sole discretion is to propose changes to the plan under Town Law § 274; and further, it alone – not

the Town Board -- is the sole town entity with jurisdiction over site plan approval (Town Code § 8-1-2 [C] [2]; Ward EBT at 162-163).

Thereafter, on March 14, 2006, the ACE issued a "provisional permit", contingent on a Water Quality Certification by NYSDEC (Complaint Ex. 16). By letter dated April 7, 2006, plaintiff requested that the site plan approval be placed on the Town Planning Board agenda for April 20, 2006 (Ex. 17).

In the meantime, the Town withdrew its request, at a regular town meeting concerning which Acquest had no knowledge (Memo of law at 213-24). The Town's resolution terminated "said commercial project" thus allegedly rendering plaintiff's investment in the property, the site plans, and the permitting process essentially valueless (Rupp Affid. ¶¶82-85; Complaint Ex. 1). Thereafter the Town assessed the property at \$75,000 (Ex. O).

The court determines that plaintiff has established as a matter of law that the "discretion of the [the Town Planning Board was] so narrowly circumscribed that approval of a proper application [was] virtually assured" (*RRI Realty Corp.*, 870 F2d at 918). However, in order to have a vested property right in -- in this case --the tap in waiver request, the landowner must have taken certain actions in reliance upon this property interest.

6B. Question of Fact: Vested Right

[A] vested right can be acquired **when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development....** Neither the issuance of a permit ... nor the landowner's substantial improvements and expenditures, standing alone, will establish the right. The landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless

(*Town of Orangetown v. Magee*, 88 NY2d 41, 47 -48 [1996] [emphasis supplied]). "Substantial expenses" can include costs to obtain a DEC permit (*Glacial Aggregates LLC*, 14 Ny3d at 137). As to the proof of substantial construction in reliance on the municipality's permission, in *Glacial Aggregates*, the court stated that "any physical alteration of the land related to mining [in that case] was prohibited until the ...DEC mining permit was in hand" (*id.* at 137).

Plaintiff submitted evidence that it expended over \$1.68 million in furtherance of the project (Mahoney Affid. ¶¶ 10-11), which would, it asserts, qualify as "substantial expenses to further the development" (*Orangetown*, 88 NY2d at 47-48). As to the lack of substantial changes, plaintiff asserts that, as in *Glacial Aggregates*, it could not legally make any physical alteration to the land until the EPA approved the site plan,

granted the tap-in waiver and the ACE issued the 404 permit (Memo of law at 24).

The court determines that there are issues of fact whether plaintiff was barred from making any substantial changes to its property until after the tap-in waiver was granted and its site plan approved (cf. *DLC Mgt Corp. v Town of Hyde Park*, 163 F3d 124, 130 [2d Cir 1998]).

6C. Questions of Fact: Wholly without Legal Justification

The second prong of a substantive due process claim is that the plaintiff was deprived of its vested property right by governmental actions under color of state law "without legal justification and motivated entirely by political concerns" (*Town of Orangetown*, 88 NY2d at 53). Further, as determined by the Court of Appeals "only the most egregious official conduct can be said to be arbitrary in the constitutional sense" so as to meet this second element (NY Prac -Comm section 105:75, citing *Bower Assocs.*, 2 NY3d 617, 628-629, citing *City of Cuyahoga Falls v Buckeye Comm. Hope Fdn*, 538 US 188, 198 [2003]; see also *County of Sacramento v Lewis*, 523 US 833, 846 [1998]).

The court determines that the affidavits of former Supervisor Mohan and the other individual defendants still in the case raise issues of fact whether there was any legitimate basis for withdrawing the tap-in waiver on March 23, 2006.

7. Procedural Due Process

Plaintiff has demonstrated, as a matter of law, that on March 16, 2006, two days after the issuance of the 404 permit by the ACE, Town Board Member Daniel Ward submitted a draft resolution withdrawing the tap-in waiver request that had been drafted by him. Dr. Mohan, the Town Supervisor at the Town, testified that such resolutions were normally posted on the Town website, but the court found no evidence of that in the record. The Town Board met four days later and terminated the project, without otherwise giving plaintiff notice or opportunity to be heard in support of the project (Huntress EBT at 109-110;; Exs. 40-43; Mohan EBT at 107-114).

The court has already determined that plaintiff has established as a matter of law that it had a property interest of constitutional dimensions in the tap-in waiver request, and thus was entitled to due process in any deprivation of that interest. What remains for decision is what process was due, and the record is not sufficiently developed on that point to permit summary judgment for either side. "The familiar factors weighed in assessing what process is due are set forth in *Mathews v Eldridge*, (424 U.S. 319, 335 [1976]) and include: (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the probable value of other procedural safeguards; and (3) the

government interest' (*County of Nassau v Canavan*, 1 NY3d 134, 142 [2003])" (*State v Getty Petroleum Corp.*, 89 AD3d 262, 267 [3rd Dept 2011]). These issues must be addressed at trial.

8. Equal Protection

Under Court of Appeals precedent, "the essence of a violation of the constitutional guarantee of equal protection is that all persons similarly situated must be treated alike. [Such a] challenge [may] rest on differential treatment as a constitutionally protected suspect class, or denial of a fundamental right ... [or] in selective enforcement" (*Bower Assocs.*, 2 NY3d at 630-631).

As to selective enforcement claims, "a violation of equal protection arises where first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person (*Harlen Assoc. v Incorporated Vil. of Mineola*, 273 F3d 494, 499 [2d Cir 2001])" (*Bower Associates*, 2 NY3d at 631).

A tap-in waiver was applied for and obtained by the Town for the property at 2250 Wehrle Drive by way of resolution in 2001 (Pl's Exs. 25, 27). The owner's site plan had been approved before it found out about the Moratorium – which the Town had "forgotten" about. An agreement

was made for the owner to pay \$10,000, perform off-site mitigation, and the Town requested a sewer -tap-in waiver which was granted.

Further, defendant Mohan testified that the owner of the Royalwoods subdivision, property also subject to the Moratorium, was permitted to build on the property and to partially tap-into the USEPA funded sewer (Mohan EBT at 58).

In the court's determination, there are questions of fact whether the Town Board, in first requesting and then, nearly four years later, withdrawing its request for a sewer tap in waiver for plaintiff, treated plaintiff differently within the meaning of the equal protection clause of the 14th amendment to the federal constitution, from the owner of 2250 Wehrle Drive and the owner of the Royalwoods subdivision.

9. Qualified Immunity for Constitutional Violations under Section 1983

The individual defendants allege that they are entitled to qualified immunity from any liability under any 42 USC § 1983 cause of action (see *Estate of Rosenbaum v City of New York* (975 F Supp 206 [EDNY 1997])).

This is an affirmative defense that must be proven by defendants (*id.* at 214-215).

Qualified immunity "generally shields governmental officials from liability for damages on account of their performance of discretionary official functions 'insofar as their conduct does

not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " McEvoy v. Spencer, 124 F.3d 92 (2d Cir.1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)).

(*Estate of Rosenbaum by Plotkin v City of New York*, 975 FSupp at 215).

This is an objective test, which the court encouraged other courts to determine on summary judgment as a matter of law (*Hunter v Bryant*, 502 US 224, 227-228 [1991]).

In contrast to the court's determination on the substantive due process claim – that as of March 2006, the Town Board had no further action to take with respect to the tap-in waiver – the board's decision to withdraw the waiver was in fact, in the court's view, a discretionary decision. Dr. Mohan testified in depth concerning the basis for his opposition to the Project in his deposition. He remembered having drafted the March 20, 2006 resolution himself. He asserted that he had seen the Property, and in his estimation, essentially, no money had been spent to develop it, as it held simply trees, bushes and grass and the like. However, Dr. Mohan admitted that he had not seen the Planning board files on the Project or read any of the relevant documents: rather he had relied upon briefings by his officers. The court determines that it was not objectively reasonable for Dr. Mohan to assume, without viewing the documentary evidence, that no constitutional rights of Plaintiff would

be violated by withdrawing the tap-in waiver years after granting it, Qualified immunity is denied to Dr. Mohan on the constitutional claims.

Mr. Ward also testified that he himself drafted the March 20, 2006 resolution and stated that did not necessarily talk to the USEPA or USDEC or review the planning board's prior negative declarations prior to taking the "hard look" he indicated in the resolution (Ward EBT at 200-209 [did not remember drafting resolution with Dr. Mohan]). The resolution was submitted no earlier than March 16, 2006 (Ward EBT at 209). The statement "terminates said commercial Project" Ward stated "speaks for itself" but in his mind he "thought that would terminate it" (210-211). In 2006 he was either unaware or uncaring that the Town Board had no jurisdiction to deny the site plan for the Property (see Amherst Town Code 8-1-2 [C] [2]). Based upon Mr. Ward's testimony at the EBT, the court denies qualified immunity as to him.

As to the remaining individual defendants, Bucki, Kindel, McGuire and Schratz, the court reserves decision as to whether they are entitled to qualified immunity.

Because the state law claims have been dismissed there is no need to address the issue of official immunity.

11. Promissory Estoppel

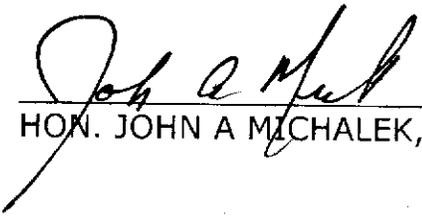
Plaintiff asserts that it relied on the Town's promise to seek a tap-in

waiver, to its detriment. However, promissory estoppel cannot be applied in this fashion against the Town given that the Town Board that submitted the tap-in waiver request in 2001-2002 contained only two of the same members as the Board that voted to withdraw it and never again to submit such a request. Generally, estoppel is unavailable against municipalities without respect to the exercise of their governmental duties, and this case should be no exception (*see generally Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]; *see Ippolito v City of Buffalo*, 195 AD2d 983 [4th Dept 983]). The court grants defendants' motion to dismiss this cause of action.

CONCLUSION

Upon due consideration, the court grants defendants' motion for summary judgment in part, and dismisses the second, third, fourth, fifth and ninth causes of action in the complaint; dismisses the complaint entirely as against defendants Barry A. Weinstein, Guy A. Marlette, and Mark A. Manna, and otherwise denies the motion; the court grants plaintiff's motion in part, determining that plaintiff has established a property interest of federal constitutional proportions in the tap-in waiver request made by the Town, but the motion is otherwise denied.

Date: September 6, 2012


HON. JOHN A MICHALEK, JSC